

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

A & A SERVICE STATION, INC. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for
the Period March 1, 2003 through May 31, 2003. :

In the Matter of the Petition :

of :

A & K SERVICE STATION, INC. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for
the Period March 1, 2003 through November 30, 2005. :

In the Matter of the Petition :

of :

EMA SERVICE STATION, INC. :

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for
the Period March 1, 2003 through May 31, 2005. :

In the Matter of the Petition :

of :

ABDURRAHMAN AYDIN :

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for
the Period March 1, 2003 through November 30, 2005. :

DETERMINATION
DTA NOS. 821605,
821606, 821607 AND
821608

Petitioner A & A Service Station, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through May 31, 2003. Petitioner A & K Service Station, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through November 30, 2005. Petitioner EMA Service Station, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through May 31, 2005. Petitioner Abdurrahman Aydin filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through November 30, 2005.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 27, 2008 at 10:30 A.M., with all briefs to be submitted by July 14, 2008, which date began the six-month period for the issuance of this determination. Petitioners appeared by Thomas P. Murray, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., of counsel).

ISSUES

- I. Whether petroleum business tax was properly included in the sales tax base in computing sales tax due on gasoline sales.
- II. Whether the Division properly computed sales tax due on cigarette sales.
- III. Whether petitioner Abdurrahman Aydin was a person required to collect tax under Tax Law § 1131(1) so that he is personally and individually liable for sales tax determined due from three Long Island gasoline stations operated by the corporate petitioners.

FINDINGS OF FACT

1. Petitioner Abdurrahman Aydin, by the three corporate petitioners in this proceeding, (1) A & A Service Station, Inc. (A & A), (2) A & K Service Station, Inc. (A & K), and (3) EMA Service Station, Inc. (EMA), operated three retail gasoline stations on Long Island located on (1) Hicksville Avenue in Bethpage, (2) Deer Park Avenue in Deer Park, and (3) E. Main Street in Islip, respectively. Mr. Aydin was an officer and shareholder of all three corporations and handled their financial affairs. He signed New York State sales and use tax returns, New York State corporation franchise returns, and powers of attorney for all three corporate petitioners. In addition, he signed checks on behalf of all of the corporations and was listed with the New York State Secretary of State as “President” for all three. In fact, a review of the administrative record does not show the name of any other individual as either an owner or corporate officer of the corporate petitioners.

2. The Division of Taxation (Division) issued a Notice of Determination dated May 8, 2006 against petitioner A & A Service Station, Inc., asserting tax due for the period March 1, 2003 through May 31, 2003 of \$2,672.68, plus interest and penalties under section 1145 of the Tax Law.

3. The Division issued a Notice of Determination dated May 8, 2006 against petitioner A & K Service Station, Inc., asserting tax due for the period March 1, 2003 through November 30, 2005 of \$18,935.83, plus interest and penalties under section 1145 of the Tax Law.

4. The Division issued a Notice of Determination dated April 3, 2006 against petitioner EMA Service Station, Inc., asserting tax due for the period March 1, 2003 through May 31, 2005 of \$24,488.00, plus interest and penalties under section 1145 of the Tax Law.

5. The Division issued three corresponding notices of determination, each dated May 5, 2006, against petitioner Abdurrahman Aydin as an “Officer/Responsible Person” of (1) A & A

Service Station, Inc., asserting tax due for the period March 1, 2003 through May 31, 2003 of \$2,672.68, plus interest and penalties under section 1145 of the Tax Law, (2) A & K Service Station, Inc., asserting tax due for the period March 1, 2003 through November 30, 2005 of \$18,935.83, plus interest and penalties under section 1145 of the Tax Law, and (3) EMA Service Station, Inc., asserting tax due for the period March 1, 2003 through May 31, 2005 of \$24,488.00, plus interest and penalties under section 1145 of the Tax Law.

6. The Division conducted a field audit of the three gasoline service stations operated by the corporate petitioners. Although the Division obtained consents to conduct test period audits, it ultimately accepted the reported gallons sold and cigarettes sold of the three businesses.¹ The taxes determined due resulted from the Division's discovery on audit that the three corporate petitioners were subtracting out the petroleum business tax from the taxable base of their fuel sales and subtracting the cigarette excise tax from the taxable base of their cigarette sales. As a result, the Division determined additional sales tax due on petitioners' sales during the periods at issue² as follows:

	Gasoline	Diesel	Cigarettes	Store	Total sales tax asserted due
A & A	\$ 1,382.53	\$ 40.05	\$1,250.11	-0-	\$ 2,672.68
A & K	\$16,311.75	\$1,418.54	\$ 673.16	\$532.38	\$18,935.83
EMA	\$23,148.00	-0-	\$ 1,340.00	-0-	\$24,488.00

¹ At the hearing, petitioners' representative contended that the Division improperly used a survey to calculate petitioner's additional sales, which was contradicted by the testimony of the Division's auditor, and supporting documentary proof. The Division used petitioners' records and did not estimate sales by using a survey. Petitioners did not continue to press this contention in their briefs.

² During the period June 1, 2003 through August 31, 2003, which is not at issue in this proceeding, the Division calculated a sales tax credit due to A & A of \$101.39. In its brief, the Division offset such credit against the tax due for the period at issue of \$2,672.68, resulting in the amount of additional tax asserted due against A & A of \$2,571.29.

The additional sales tax due of \$532.38 on the store sales of A & K, other than its cigarette sales, as shown above, was based upon a 40% markup of A & K's purchases of taxable items other than cigarettes. Since the Division performed a detailed review of petitioners' purchase records and utilized the same markup of 40%, which petitioners used to compute taxable sales reported on their tax returns, petitioners have apparently conceded this minor part of the assessment.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioners challenge Tax Law § 1111(k), which provided the basis for the Division's inclusion of petroleum business tax in the taxable base of fuel sales subject to the imposition of sales tax. According to petitioners, this statutory provision "allows the State to expand its taxing power into an area for which there is no precedent." Petitioners argue that the State may not "collect taxes . . . on taxes previously charged." With regard to the Division's calculation of tax due on cigarette sales, petitioner contends that the auditor erred by including the "NYS excise tax (of \$1.11 per pack) in taxpayer's calculation of taxable base." Petitioners concede that the issue concerning the inclusion of the petroleum business tax in the taxable base for fuel sales was decided against petitioner A & A Service Station, Inc., by the Tax Appeals Tribunal in its decision in *Matter of A & A Service Station, Inc.* (February 5, 2004 [Tribunal affirmed the determination of the administrative law judge in *Matter of A & A Service Station, Inc.* (December 26, 2002)³]). Petitioners chose to relitigate because the administrative record in the earlier matter involved "other issues than those in this matter" According to petitioners, these matters are more easily appealed to the Appellate Division.

8. The Division maintains that it properly included the petroleum business tax and the cigarette excise tax in the sales tax base pursuant to Tax Law § 1111(j), (k) and 20 NYCRR

³ By a letter dated October 8, 2008, the parties were given notice by the administrative law judge that he was taking official notice, pursuant to State Administrative Procedure Act § 306(4), of the findings of fact as previously determined in this earlier matter involving one of the corporate petitioners in these matters.

526.5. The Division emphasizes that the main issue in these matters was decided against the taxpayer in *Matter of A & A Service Station, Inc.*

CONCLUSIONS OF LAW

A. Petitioners' argument that the Division incorrectly calculated sales and use tax due on a tax base for its fuel sales, which included petroleum business tax, is without merit. Pursuant to Tax Law § 1111(k), petroleum business tax is required to be included in the calculation of receipts subject to tax. The Tax Appeals Tribunal affirmed such requirement in *Matter of A & A Service Station, Inc.* (February 5, 2004).

B. Similarly, the Division properly utilized a tax base for petitioners' cigarette sales which included cigarette excise tax. Pursuant to Tax Law § 1111(h), cigarette excise tax is required to be included in the calculation of receipts subject to tax .

C. As noted in paragraph 7 above, petitioners' contention that the Division may not collect taxes on taxes previously charged, in effect, challenges the statutory provisions noted above. Although petitioners do not cite any legal cases or statutory provisions in support of their contention, they are seeking presumably to challenge these statutory provisions on constitutional grounds. The Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*Matter of RAF General Partnership*, Tax Appeals Tribunal, November 9, 1995). At the administrative level, statutes are presumed to be constitutional (*Matter of Lunding*, Tax Appeals Tribunal, February 23, 1995, *annulled on other grounds* 218 AD2d 268, *rev'd* 89 NY2d 283, *rev'd* 522 US 287).

D. Petitioner Abdurrahman Aydin was a person under a duty to act for each of the three corporate petitioners. As noted in Finding of Fact 1, there were many factors which establish that he was a person under a duty to act for each of the corporate petitioners: his status as an officer, his writing of checks on behalf of the corporations, his control over the financial affairs of the

corporations, and his signing of tax returns (*see Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994).

E. Petitioners have made no showing that the penalties were wrongly assessed or that reasonable cause exists to abate penalty.

F. Finally, petitioners object to the speculation in the Division's post-hearing brief that Abdurrahman Aydin did not appear at the hearing in order to avoid cross-examination concerning the actual selling prices for gasoline and cigarettes. The Division speculates that his businesses may have collected sales tax based on the correct taxable base for fuel and cigarette sales, but "when it came time to file sales tax returns those taxes were then 'backed out'." This speculation by the Division concerning fraud by petitioners is given no weight and is irrelevant for purposes of resolving the issues in dispute. Nonetheless, petitioners' request that such contentions "should be *stricken* from the Brief" is denied (emphasis added).

G. The petitions of A & A Service Station, Inc., A & K Service Station, Inc., EMA Service Station, Inc. and Abdurrahman Aydin are denied, and the notices of determination dated May 8, 2006 issued against petitioners A & A Service Station, Inc., and A & K Service Station, Inc., the Notice of Determination dated April 3, 2006 issued against petitioner EMA Service Station, Inc., and the three notices of determination dated May 5, 2006 issued against petitioner Abdurrahman Aydin are all sustained.

DATED: Troy, New York
December 4, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE